

July 21, 2008

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MEMORANDUM FOR ALL LMSB INDUSTRY DIRECTORS  
DIRECTOR, FIELD SPECIALISTS  
DEPUTY COMMISSIONER (INTERNATIONAL)

FROM: Frank Y. Ng /s/ *Frank Y. Ng*  
Commissioner, Large and Mid-Size Business Division

SUBJECT: Whistleblower/Informant Cases and Subject  
Matter Experts

IRC section 7623 was amended in December 2006, to encourage whistleblowers to provide the IRS with information regarding significant alleged tax noncompliance. As a result of this new legislation, there has been a large increase in the number and quality of informant claims for award on LMSB cases.

As of January 2008, all Applications for Award for Original Information (Forms 211) must be filed with the Whistleblower Office (WO). The attached 3-step flowchart which outlines a process for analyzing informant information and disseminating it to the field has been approved by the IRS Enforcement Committee. This 3-step process is only used for claims determined by the WO to meet the dollar thresholds of IRC section 7623(b). Section 7623(a) claims will continue to be processed by the Ogden Informant Claims Examiner unit and may be sent directly to the field.

Step 1 tracks the initial receipt of information and the initial review of the claim from the informant. The WO is primarily responsible for the activities occurring in Step 1.

Once the initial review by the WO is complete, Step 2 requires the WO to send the informant information to a Subject Matter Expert (SME) in each Business Operating Division. For LMSB, an SME has been established in each Industry, Field Specialists, and International.

The SME, with Division Counsel support, will evaluate the information provided by informants to determine its merit and what action should be taken. The SME does not

have to be a subject matter expert on the technical issues outlined in the informant's claim, but should have a technical tax background and some knowledge of evidentiary concerns.

The SME serves to insulate the audit team from direct contact with the whistleblower and must ensure the audit team does not receive "tainted" information. Tainted information may include documents that are subject to privilege or were illegally obtained by the informant. In addition, the SME will need to adhere to the limitations on contacts with informants who are current employees of the taxpayer or taxpayer representatives. These limitations are often referred to as the "one-bite" and the "no-bite" rules and are addressed in the attached Chief Counsel Notice 2008-011. Because evidentiary concerns can result from information obtained from any informant, the SME should seek Division Counsel assistance with the legal issues surrounding evidence obtained from informants including but not limited to the "one-bite" and "no-bite" rules discussed in Chief Counsel Notice 2008-011.

If informant information is tainted, the SME and anyone who reviews the tainted information will not be able to participate in the civil examination after the information is passed on to the audit team. For internal control purposes, anyone who views the informant information should not participate in the examination. Until the activities in Step 2 are completed and a decision regarding what information, if any, can be sent to the audit team, interaction between personnel involved in Step 2 and the audit team should be limited and coordinated with Division Counsel. Contact with the audit team could compromise issues and adjustments that the team is currently evaluating.

The SME, with support from Division Counsel, has a number of other responsibilities including:

- Ensuring the Form 211 is complete and accurate. If not, questions can be raised to the WO Analyst who conducted the preliminary review of the Form 211.
- Determining if the taxpayer is under audit. If the taxpayer is not under audit, and the SME determines that the claim should be sent to the field, then the SME may need to work with the Industry PSP to secure a tax return(s) for analysis and potential assignment.
- Reviewing and evaluating the information to determine whether there is an examination issue worthy of pursuing.
- Determining if the audit team has already identified the issue or if the information could help make the development of an existing issue more efficient or more complete. If the issue has been identified, determine when and how the team identified it. To accomplish this, the SME may need to contact the audit team. It is very important that the SME does not provide any information to the audit team and that the SME documents all action on the claim. Contact with the audit team should be coordinated with the LMSB Division Counsel Fraud/Whistleblower Coordinator. Information about the audit status and issues should flow from the

audit team to the SME and not vice versa. For example, the SME may ask the audit team for its audit plan and risk analysis, including any potential issues not included in the audit plan.

- Obtaining additional technical experts, if necessary, to assist in the evaluation of the informant information. These experts, who may be technical advisors, field specialists, examiners, or managers, will not be able to participate in the examination if the information they review is “tainted.” Tainted information includes, but is not limited to information that is privileged, illegally obtained by the whistleblower, or information obtained by the government in a non-passive manner. Therefore, SMEs should use caution in seeking assistance from other Service personnel and avoid seeking assistance from anyone with line authority over the audit.
- Identifying potential legal issues in developing the issue(s) associated with the claim.
- Interviewing the whistleblower to clarify information submitted, identify additional evidence or information in their possession or known to them<sup>1</sup>, and identifying the actual relationship between the informant and the taxpayer. The results of the debriefing should be documented in writing and any new information provided must be evaluated for potential legal issues (taint or privilege).
- Determining if the whistleblower is subject to the “one bite” rule discussed in CC-2008-11. If so, prior to any contact with the whistleblower, Counsel should be contacted to discuss how to proceed. If the whistleblower is subject to the “one bite” rule, prior to the interview, the whistleblower should be advised that the interview will be their only opportunity to provide information or documentation to the Service regarding any claim for award. If there is a need to conduct follow-up contacts with the whistleblower, Counsel should be consulted and decisions to have any additional contacts will be elevated. If the whistleblower is not subject to the “one bite” rule then additional contacts should be carefully considered ensuring that the Service is not encouraging activities that are prohibited.
- Instructing whistleblowers and their representatives to contact the WO if they are interested in information regarding the status of their claims. The SME should refer the whistleblower or the representative to the WO Analyst handling the claim.
- Documenting the actions taken by the SME and Counsel, and any additional documentation obtained during Step 2 and 3 of the process.
- Determining whether to reject the informant claim. If rejected, the SME will complete Form 11369, Evaluation Report on Claim for Award, obtain the Executive Assistant's review and approval, and close the claim to the WO. The Form 211, informant information, activity logs, workpapers, interview notes, and additional information secured and used in making this determination should be returned to the WO Analyst. The WO will close the claim and notify the whistleblower. Examples of when to reject a claim may include, but are not

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<sup>1</sup> SME interviews with the whistleblower are subject to the limitations contained in Chief Counsel Notice 2008-011.

limited to; 1) the issue has already been identified by the audit team and information provides no additional leads; 2) the issue has already been identified by the audit team and the audit team determined not to pursue it; 3) information is not credible; and 4) the claim results from information that is subject to privilege that was not waived by the taxpayer.

- Determining whether to accept the informant information. If there are no limitations on the use of the information, the claim and all information is referred to an audit team for case development. Field personnel should be advised never to contact a whistleblower that is a current employee or subject to the "one-bite" rule. Further, if the audit team believes that additional consultation with a whistleblower would be helpful, the audit team should contact the SME for coordination. Communications between the SME and the audit team should be limited to ensure the integrity of the examination and "tainted" information is not shared with the audit team. For additional information, the SME can refer field employees to the Informant Claim Analyst in PQAS.
- If the SME and Division Counsel identify limitations on the use of the information, Division Counsel will draft a risk analysis memorandum that will be elevated within the Office of Chief Counsel for consideration as identified in Step 3 of the flowchart.
- The SME should monitor the status of cases that are sent to the field as periodic updates may be required for the LMSB Commissioner.

In Step 3, Counsel and the SME will make a recommendation to the Industry Director on the legal issues and risks associated with the informant information. The Industry Director has been designated as the Senior Operating Division decision maker and will decide whether and how to proceed with the case.

Occasionally, a Form 211 alleges noncompliance by more than one taxpayer regarding the same issue. If these taxpayers fall under the jurisdiction of more than one Industry, the WO Analyst will determine which Industry is most affected and will send the claim to that Industry. The WO Analyst should consult with all of the impacted Industries prior to assigning the claim to ensure the claim is handled in the most efficient manner. The SME receiving the claim needs to coordinate with the SME(s) from the other Industries and Field Specialists early in the evaluation process. While it will generally be advantageous for only one Industry to perform the analysis required in Step 2, the information must be shared with the other Industries if it is determined to have value so it can be distributed to the impacted examinations. Subsequent coordination amongst the SMEs may be required to ensure consistency.

Further details on the receipt and evaluation of informant information are contained in the attached flowchart. Additional guidance on this process, including a briefing with the SMEs, is forthcoming. Bi-weekly conference calls with the SMEs and Counsel to

discuss this process and any concerns have already been scheduled. Please see the Informant Claim website for additional information on this process:

[http://lmsb.irs.gov/hq/pqa/Post-filing/Informants\\_Claims.asp](http://lmsb.irs.gov/hq/pqa/Post-filing/Informants_Claims.asp)

If you have any questions or need additional information, please contact me or Senior Manager, Craig Leeker at 860-258-2061. Members of your staff may contact Team Manager, Amy Liberator at 330-253-7341.

Attachments (3)

1. [Receipt of Information and Initial Review](#)
2. [Three Step Claim Process Flowchart](#)
3. [CC-2008-011](#)

[1] SME Interviews with the whistleblower are subject to the limitations contained in Chief Counsel Notice 2008-011.

**Attachment 1**  
**Whistleblower Office Flow Chart**  
**Receipt of Information and Initial Review**

Step 1 describes initial actions by the Whistleblower Office to receive and process Forms 211. As we do the initial administrative steps, we will screen out cases that clearly do not meet 7623(b) criteria (more than \$2 million in dispute and, in the case of an individual, more than \$200,000 in gross income for at least one year), or other criteria specified by the ODs and CI. Typical cases that would be screened out at this stage include those that do not identify the taxpayer allegedly involved, are obviously speculative, or report relatively minor issues such as a dispute among parents over which one may claim a dependent.

To date, credible cases involving LMSB taxpayers involve allegations of tax noncompliance well in excess of the \$2 million threshold. It does not appear that supplemental criteria are needed for LMSB cases.

Cases that pass the administrative screening will be assigned to an analyst, who will research the issues raised by the informant, check IDRS for open examinations or investigations and determine whether the matter should stay in the WO process or should be referred to the Ogden ICE unit for routine processing.

Any cases that do not appear to meet 7623(b) criteria or OD/CI supplemental criteria will be forwarded to the Ogden Campus ICE unit for routine processing. These “routine” cases, whether identified in the initial administrative screening or by the analyst, are not discarded. “Routine processing” includes recording claim information, a classification review and referral for field investigation, or examination of cases clearing the classification hurdle. Ogden ICE will handle interactions with informants on these cases.

For cases that stay in the WO process, the analyst will monitor the case until final resolution of the tax case and a determination on the informant award. Step 1 in the WO process is completed when the case is reviewed for fraud potential and possible referral to CI. The most common result is that the case is not referred to CI, and it proceeds to Step 2, OD Subject Matter Expert (SME) Analysis.

Step 2 OD SME Analysis is intended to accomplish several objectives. The most basic objective is to evaluate the information provided to determine whether it may materially contribute to identification, development or resolution of taxpayer liability or collection issues. This is, in effect, a classification decision. Another objective is to insulate any resulting examination or investigation from improperly obtained information or other potential “taints” that could compromise the tax case. If the SME reviews information that cannot be used in the examination or investigation, the integrity of the tax case is preserved by withholding that information from the auditor or investigator, and by ensuring that the SME does not advise or supervise the examination or investigation.

The OD SME analysis begins when the case is forwarded to a designated OD SME by the analyst. The OD SME will consult with OD Counsel to identify any potential legal

issues to be wary of in developing the issues presented by the informant, and may decide to obtain additional subject matter expertise for a team analysis of the matter.

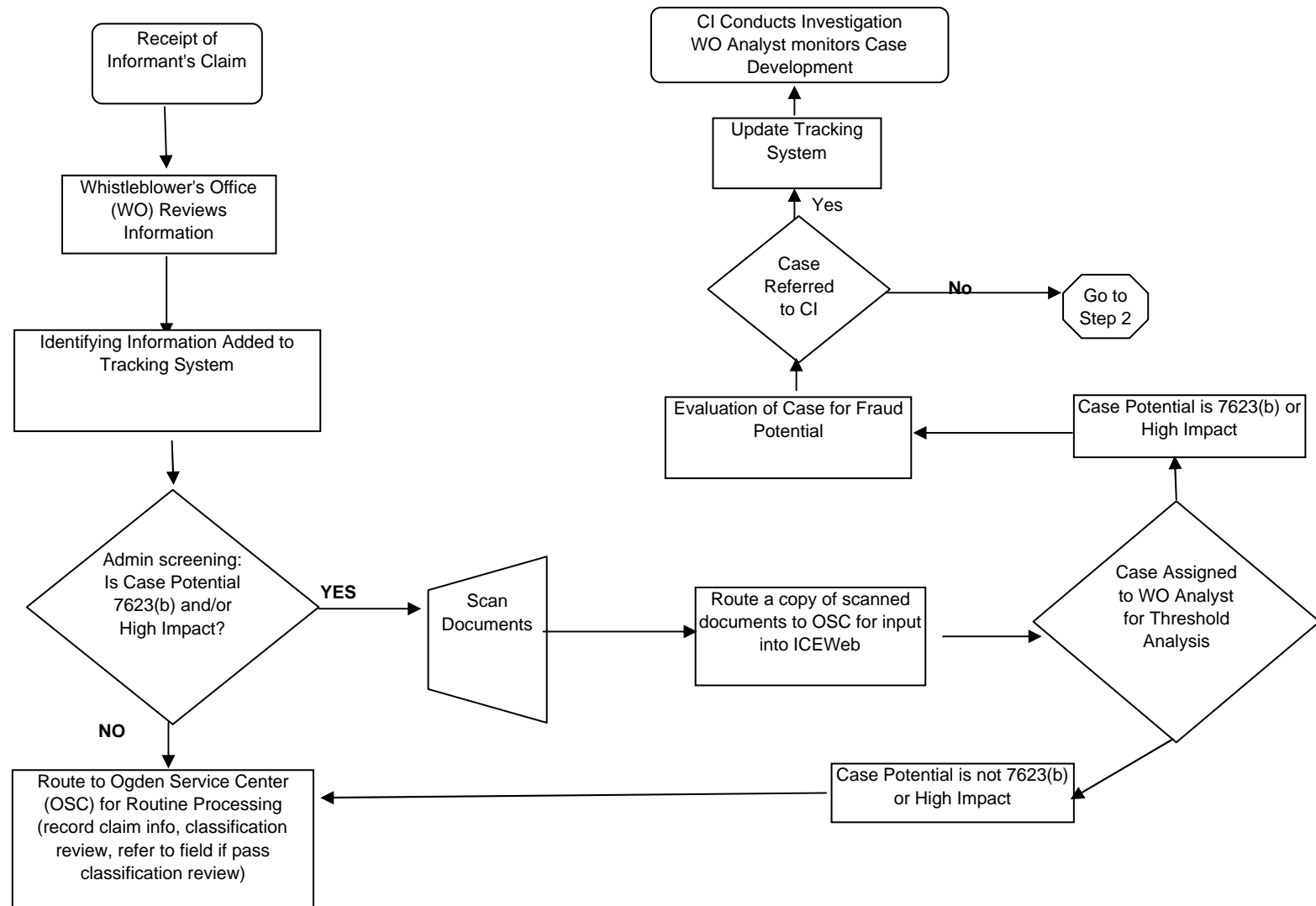
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The initial legal advice should address possible limitations on interactions with the informant, as may be the case if the informant is a tax professional seeking to report a client, or is a current employee of the taxpayer.

- The substantive analysis by the OD SME should be tailored to the nature of the information provided. A general list of relevant lines of inquiry appears on the flowchart. There is a strong presumption that the informant will be debriefed. The informant may have additional information that he/she did not recognize as relevant. Debriefings will include instructions to the informant, comparable to those used by CI, which warn the informant not to violate the law or engage in acts that the Service would be precluded from doing.
- The OD SME analysis may or may not involve continuing OD Counsel support, depending on the issues raised in the particular case. That support could be on a substantive tax issue, or on the procedural issues involved in gathering information from the informant. If there are potential issues related to the use of any of the information offered by the informant, the SME analysis and interaction with the informant must include complete factual development of those issues (What was the relationship between the informant and the taxpayer? How did the informant obtain the information? What steps did the taxpayer take to protect the possibly privileged information from disclosure? What facts may support the informant's belief that the crime or fraud exception applies? etc.)
- At the end of Step 2, the OD SME makes a determination regarding the potential return to the Service if action is taken to pursue the lead offered by the informant.
  - If the lead does not appear productive, the SME reports that conclusion to the WO analyst, who will close the case and notify the informant.
  - If the lead appears to be productive, OD Counsel is given the opportunity to identify potential legal limitations on the use of the information. If there are no legal limitations, the case is forwarded for examination, and the WO analyst monitors case status until the examination is resolved. If the OD Counsel identifies potential legal limitations on use of information, he/she drafts a risk analysis and the case proceeds to Step 3.

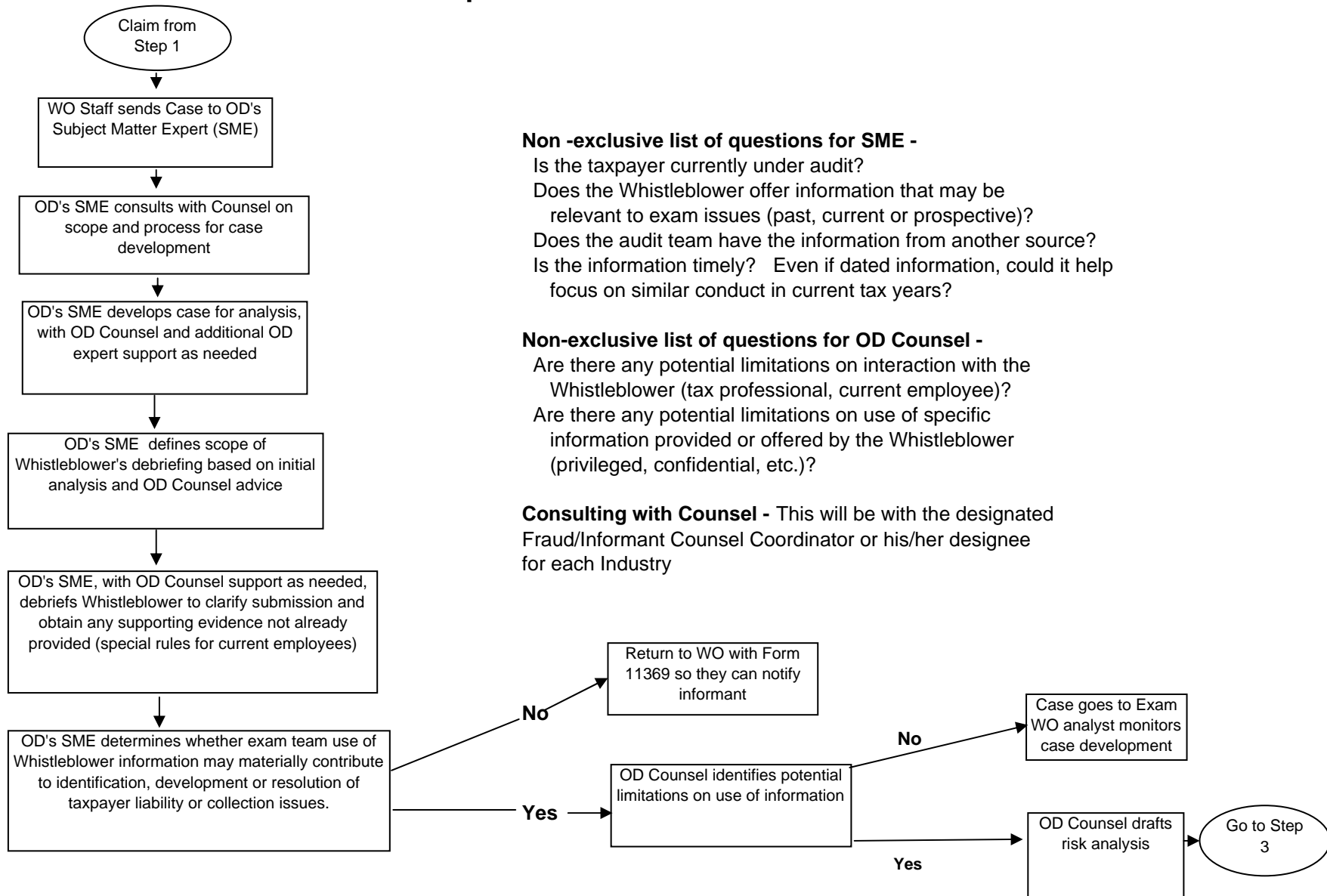
Cases that reach Step 3 are those with examination potential and potential legal limitations on the use of information provided by the informant. There is limited case law directly applicable to informant cases in civil examinations, and the law on criminal cases emphasizes the importance of analysis of the specific facts and circumstances presented. Thus, the factual development in Step 2 is an essential prerequisite to the legal risk analysis outlined in Step 3, as well as the business decision as to whether the risks of acting on the information are outweighed by the potential return (and the potential risk of not acting).

**Attachment 2 - Three Step Claim Process**  
**Receipt of Information and Initial Review**  
**Step 1**





## Operating Division's Subject Matter Expert's Analysis Step 2



## Risk Analysis Step 3

